

Washington justices shift burden in rape cases

The Bellingham Herald

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Associated Press October 30, 2014

SEATTLE — Reversing what it called "incorrect and harmful" earlier rulings, the Washington Supreme Court said Thursday the state cannot put the burden on rape defendants to prove that an alleged victim consented — a decision critics said will make it harder to punish dangerous sex offenders.

The court had previously ruled that when a defendant charged with forcible rape claimed the contact was consensual, it was up to the defendant to prove there was consent by a preponderance of the evidence.

The rulings essentially made consent an affirmative defense to a rape charge, the way a killer can claim self-defense in a murder case.

But in a 6-3 opinion Thursday, the justices said those decisions wrongly interpreted U.S. Supreme Court precedent. Prosecutors must prove every element of a crime beyond a reasonable doubt, and making a defendant prove that there was consent got that requirement backward, they said.

"Requiring a defendant to do more than raise a reasonable doubt is inconsistent with due process principles," Justice Debra Stephens wrote for the majority, saying it raises "a very real possibility of wrongful convictions."

Justice Susan Owens wrote the dissent, arguing that the majority's opinion would reverse decades of progress in the handling of rape cases.

Before 1975, she noted, rape was defined in state law as sex "committed against the person's will and without the person's consent." This required prosecutors to prove that a rape victim had not consented — meaning trials often focused as much on the actions of the alleged victim as on the actions of the defendant. That discouraged victims from reporting the crimes. The Legislature changed the definition in 1975, removing the reference to consent and requiring prosecutors to prove "forcible compulsion" — force that overcomes resistance, or threats that put a person in fear of death or injury. The intent was to put the focus back on the actions of the defendant, Owens said.

"Placing the burden on the State to disprove consent wrongfully puts the victim's actions and reputation on trial," she wrote. "Not only does the majority's decision invalidate

years of work undertaken to properly refocus our rape law, but it also has serious implications for victims of an already underreported type of crime." Emily Cordo, former legal director of the Sexual Violence Law Center in Seattle, agreed.

"You are going to have decisions from jurors based on misperceptions about how victims should behave rather than based on what the defendant did," she said. "Washington, like every other state, has a real problem getting actual rapists convicted. This makes it that much more difficult." But the majority said the use of force is an element of the crime: It can't be true that a rape case involved both forcible compulsion and consent. For defendants to prove consent, they are also disproving forcible compulsion — which means the state has been requiring defendants who claim consent to prove they didn't commit the crime, rather than requiring prosecutors to prove the defendant did, the justices suggested.

The ruling came in the case of a boy identified only as W.R. Jr., who was convicted of second-degree rape in King County. He was awarded a new trial.

W.R. Jr.'s attorney, Gregory Link of the Washington Appellate Project, characterized criticism of the ruling as "fear-mongering."

"I don't think there's any concern we're going back to the dark days of rape prosecution," he said. "This doesn't change much. It just clarifies for jurors who has the burden of proof and who doesn't. Outside this one area of law, that's the way things are always done."

Benton County Prosecutor Andy Miller, who chairs the special assault committee of the Washington

Association of Prosecuting Attorneys, echoed that.

"We always had to prove forcible compulsion beyond a reasonable doubt," he said. "There's a chance it may not affect things as much as people fear." Link said that because of procedural rules, he did not expect the ruling to lead to many new trials for defendants convicted under the old Supreme Court holdings.